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No. 14-7505

In the Supreme Court of the United States

TIMOTHY LEE HURST,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the
Florida Supreme Court

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

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INTRODUCTION

For murdering Cynthia Harrison, Timothy Lee Hurst was tried, convicted, and sentenced to death. Hurst's death sentence came only after the court and the jury found beyond a reasonable doubt that Hurst's crime involved at least one aggravating circumstance. In a detailed written order, the trial court specifically found two: that Hurst committed the murder during the course of a robbery and that the crime was especially heinous, atrocious, or cruel. JA261-63.

In the Florida Supreme Court, Hurst admitted the aggravating circumstances, characterizing the crime as a "robbery gone bad" and disclaiming any challenge to the aggravating circumstance findings. Appellant's Initial Br. 24-25 (No. SC12-1947). He nonetheless argues here that *Ring v. Arizona,* 536 U.S. 584 (2002), entitled him to specific jury findings regarding the aggravating factors he conceded. He further argues that only the jury—and not the judge—can impose a death sentence. Hurst asks too much of *Ring*.

This Court has consistently upheld Florida's capital sentencing scheme, which in essence treats the judge and the jury as "cosentencer[s]." *See Lambrix v. Singletary*, 520 U.S. 518, 528 (1997). The Court has rejected claims that the jury must decide the sentence, *Spaziano v. Florida*, 468 U.S. 447, 465 (1984), that a court cannot rely on its own findings, *Hildwin v. Florida*, 490 U.S. 638, 640 (1989) (per curiam), and that the overall scheme leads to arbitrary sentences,

Proffitt v. Florida, 428 U.S. 242, 251 (1976) (joint opinion of Stewart, Powell, Stevens, JJ.).

Ring undermined none of this. Instead, *Ring* narrowly held that the principle of *Apprendi v. New Jersey* applies to capital sentencing, meaning a defendant cannot become eligible for a death sentence based on facts found solely by a judge "sitting without a jury." *Ring*, 536 U.S. at 609 (citing 530 U.S. 446, 494 n.19 (2000)). Even under this rule, the judge may impose any sentence authorized "on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). And in this case, the "facts" necessary to make Hurst eligible for death were both reflected in the jury's decision and admitted by Hurst. Hurst's sentence complies with *Apprendi* and *Ring*.

Florida's capital sentencing scheme was constitutional before *Ring*, and it remains constitutional in light of *Ring*.

STATEMENT

A. Timothy Lee Hurst's Crime

On the morning of May 2, 1998, there was a murder and robbery at a Popeye's Fried Chicken restaurant in Pensacola. JA27. Cynthia Harrison, a young assistant manager, was scheduled to begin work at eight that morning. JA27. Around 10:30, other employees entered the restaurant and found the restaurant's safe unlocked and open, its contents ($375 and the previous day's receipts) missing. JA28-

29. They also found Ms. Harrison, dead on the floor inside the freezer. JA28-29.

Black electrical tape bound Ms. Harrison's hands and covered her mouth. JA29. She had suffered "at least sixty slash and stab wounds," including on her face, neck, back, and arms. JA129. The wounds, which were consistent with those a box cutter would inflict, included some so deep that they "cut through the tissue into the underlying bone." JA29. Although it appeared someone had tried to clean the scene, a "significant amount" of Ms. Harrison's blood remained on the floor, JA129, and blood on her pant knees indicated she had been kneeling in it, JA29. Her blood was also on a box cutter that lay nearby. JA129.

Other than Ms. Harrison, the only employee scheduled to work at eight that morning was Hurst. JA27-28. Evidence at trial showed that Ms. Harrison and Hurst were alone in the restaurant at the time of the murder. JA27-28. Evidence also showed that the box cutter at the scene was like one Hurst displayed a few days earlier but not the type used at Popeye's. JA29. And evidence showed that the electrical tape that bound Ms. Harrison was similar to tape later found in Hurst's car. JA29.

According to Hurst's friend Michael Williams, Hurst had previously talked about robbing Popeye's and subsequently admitted murdering Ms. Harrison with a box cutter. JA130. A second friend, Lee-Lee Smith, similarly testified that Hurst admitted the murder and robbery. JA130; *see also* JA597-99. According to Smith, Hurst came to Smith's house that morning and asked Smith to keep a container filled

with the robbery's proceeds. JA30. Smith further testified that he washed Hurst's bloody pants and threw away Hurst's shoes and bloodstained socks. JA30. Police later recovered the shoes and other evidence (including Ms. Harrison's driver's license and coin purse, a bank bag marked with "Popeye's" and Ms. Harrison's name, and a bank deposit slip bearing Hurst's fingerprints) from a trash can at Smith's house. JA30-31.

Authorities promptly apprehended Hurst and charged him with murder. From the beginning, Hurst denied that he ever made it to work that morning, explaining that car troubles kept him away. JA31. He provided a statement to police, recounting his supposed activities that day and insisting that he was not at Popeye's when Ms. Harrison was murdered. JA31.

Hurst was convicted of murder and twice sentenced to death. JA289, 297.

B. Florida's Death Sentencing Framework

Florida's capital sentencing scheme originated with Florida's response to *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). *See Dobbert v. Florida*, 432 U.S. 282, 288, 294-95 (1977). The revised system, upheld in *Proffitt v. Florida*, 428 U.S. 242 (1976), provides for "substantial" additional protections, including a bifurcated sentencing proceeding and a limited class of crimes eligible for death—those with one or more aggravating circumstances. *Dobbert*, 432 U.S. at 290-91, 294-95; *Proffitt*, 428 U.S at 251-53 (joint opinion of Stewart, Powell, Stevens, JJ.). From

conviction to sentencing, Florida's system encompasses these steps:

First, absent a guilty plea or waiver, a unanimous jury determines the defendant's guilt. *See* Fla. R. Crim. P. 3.440. In some cases, the conviction also includes a determination that a statutory aggravating circumstance exists—if, for example, the jury concurrently convicts the defendant of a crime that constitutes an aggravating circumstance under Florida law. *See infra* at 19-21.

Second, a separate sentencing proceeding follows any capital conviction, allowing the defendant to present mitigating evidence that was not part of the guilt phase, and allowing the State to present additional evidence of aggravating circumstances. *See Dobbert*, 432 U.S. at 295. The jury provides "an advisory verdict based upon its perception of aggravating and mitigating factors in the case." *Id.* The jury may recommend death only if it finds at least one aggravating circumstance beyond a reasonable doubt and determines that mitigating circumstances do not outweigh aggravators. *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005); *see also Parker v. Dugger*, 498 U.S. 308, 318 (1991), *holding modified on other grounds by Brown v. Sanders*, 546 U.S. 212 (2006).

Third, after the jury's weighing and recommendation, the court holds a *Spencer* hearing allowing both sides to present additional evidence or argument and allowing the defendant to address the court directly. *See Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993).

Fourth, after the *Spencer* hearing, the trial court conducts its own, independent weighing and imposes the sentence. The court may impose a death sentence "only after making a written finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Dobbert*, 432 U.S. at 295; *see also* Fla. Stat. § 921.141(3) (2011).[1] In making its decision, the court must give the jury's recommendation "great weight," and if the jury recommends life, the court may impose death only in the most extraordinary circumstances. *See Tedder v. State*, 322 So. 2d 908, 911 (Fla. 1975) (precluding override of life recommendation unless "the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ"); *see also Cheshire v. State*, 568 So. 2d 908, 910 (Fla. 1990) (noting override authorized only when there is no reasonable basis in the record for life recommendation). No Florida judge has overridden a jury's life recommendation since 1999. *See infra* n.9.

Finally, the Florida Supreme Court automatically reviews all death sentences, conducting a full record review for sufficiency of evidence and proportionality, regardless of whether the defendant seeks appellate review. *See Robertson v. State*, 143 So. 3d 907, 908-09 (Fla. 2014); *see also* Fla. Stat. § 921.141(4); Fla. R. App. P 9.142(a)(5).

Hurst's trial and sentencing proceeded under this framework.

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[1] All citations of Florida Statutes are to the version effective at Hurst's resentencing.

C. Procedural History

1. Hurst's Conviction and Initial Sentence

Hurst was convicted of first-degree murder after a four-day jury trial in March, 2000. He never questioned whether Ms. Harrison's murder took place during the course of a robbery. In fact, his opening statement began by acknowledging that "the evidence in this case is going to be that on May the 2nd, 1998, sometime during the early morning hours there was a death and robbery at the Popeye's." 2000 ROA Tr. 167.[2] Hurst simply argued that someone else did it.[3]

The State's theory, on the other hand, was that it was Hurst who murdered Cynthia Harrison in the course of robbing Popeye's. As Hurst later put it in his postconviction motion, the State's case was that the murder "involved, at a minimum, a robbery of significant amounts of cash from a safe and cash register." 2007 ROA R.283.

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[2] The Florida Supreme Court's most recent review of Hurst's case included records associated with his previous appeals. *See* Fla. R. App. P. 9.142(a)(1). References to materials not reproduced in the Joint Appendix are identified by the associated Florida Supreme Court record on appeal (ROA).

[3] That someone, he argued, was Hurst's friend, Lee-Lee Smith. In closing argument, Hurst's counsel disputed Smith's testimony that Hurst admitted he "robbed the place and killed the lady"; instead, Hurst's counsel argued, "that's precisely what Lee-Lee Smith did to the lady. Exactly what he did to her." 2000 ROA Tr. 860.

The court instructed the jury that Hurst faced a charge of first-degree murder, which could take the form of premeditated murder or felony murder, with robbery as the predicate for felony murder. 2000 ROA Tr. 919-21. The jury returned a unanimous guilty verdict for first-degree murder, without specifying premeditated murder or felony murder. 2000 ROA R.448.

In the penalty phase that followed, the court instructed the jury that it could recommend death only if it found at least one aggravating circumstance beyond a reasonable doubt and if it found insufficient mitigating evidence to outweigh any aggravators. 2000 ROA Tr. 983-84. The court instructed on two possible aggravating circumstances: that the murder was committed in the course of a robbery, and that the murder was "especially heinous, atrocious, or cruel." 2000 ROA Tr. 984. The jury returned an 11-1 vote recommending death. 2000 ROA R.450.

In his sentencing memorandum filed after the recommendation, Hurst acknowledged that "[t]he State established two aggravating circumstances," the robbery and the heinous, atrocious, or cruel factor. 2000 ROA R.451. Rather than contest the aggravators, Hurst argued that "[t]he mitigators outweigh the aggravators, and the defendant should be sentenced to life." 2000 ROA R.453.[4]

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[4] Hurst raised a number of claims in his motion to vacate his conviction, filed in 2003 and supplemented four times over the following two years, *see infra* at 10. While Hurst alleged his trial counsel was ineffective on over a half-dozen grounds, he never challenged counsel's conceding that the murder took place during

The trial court sentenced Hurst to death, finding both aggravating circumstances, along with a third: that Hurst committed the crime to avoid arrest. JA32.

2. Hurst's Florida Supreme Court Appeal

Hurst challenged his death sentence in the Florida Supreme Court. He did not challenge his murder conviction, but the Florida Supreme Court nonetheless independently examined the record and found sufficient evidence to support the conviction. JA33.

Regarding the death sentence, the Florida Supreme Court rejected the trial court's avoiding-arrest determination. The court found the error harmless, however, because of the strength of the other aggravators. JA35-36. Indeed, the court recognized, the remaining two were undisputed: "Hurst does not challenge the aggravating factors found by the trial court that the murder was especially heinous, atrocious, or cruel (HAC), or that the murder took place during the course of a robbery." JA33. The Florida Supreme Court affirmed, JA50, and this Court denied certiorari, 537 U.S. 977 (2002).[5]

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the course of a robbery. JA53-126, 150, 175-76. Regardless, even after resentencing, Hurst offered the same concession in the Florida Supreme Court. *See infra* at 12.

[5] Hurst's certiorari petition alleged that Florida's death sentencing scheme violated *Ring* because it "*requires* fact findings by the trial judge before a death sentence may be imposed." 02-5912 Pet. 12.

3. Hurst's Resentencing and Appeal

Hurst returned to the trial court and petitioned for postconviction relief. JA53-54. After the lower court denied relief, Hurst again appealed to the Florida Supreme Court. JA127.

The Florida Supreme Court rejected all of Hurst's guilt-phase claims but vacated the death sentence after finding trial counsel ineffective for failing to investigate certain mitigation evidence at the penalty phase. JA176, 191. The court again acknowledged that "the facts of the murder established that it was especially heinous, atrocious or cruel," and "that the murder was committed during a robbery." JA188. However, it found that a proper investigation might have produced additional mitigating evidence showing, for example, Hurst's borderline intelligence and possible fetal alcohol syndrome. JA185-87. The court remanded for resentencing to allow that mitigating evidence to be weighed against the aggravators. JA192.

During the 2012 resentencing proceeding, the jury heard a range of new mitigation evidence. Hurst presented expert evidence about his alleged mental disorders, intellectual disability, and fetal alcohol syndrome. *See* JA300-04. Hurst did not, however, present evidence questioning whether the murder involved a robbery; his counsel argued instead that the jury could find reasonable doubt whether Hurst was more than a minor participant in the crime. JA977-80.

Like the first jury, this jury was instructed that any death recommendation must include a finding of an aggravating circumstance:

> An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.
>
> The State has the burden to prove each aggravating circumstance beyond a reasonable doubt.
>
> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment .
>
> Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.

JA210-13. By a 7-5 vote, the jury recommended death. JA217. The trial court held a *Spencer* hearing, during which neither side submitted additional evidence. JA218-29; Pet'r Br. 11. The court then sentenced Hurst to death in a detailed, written order. JA258-71.

Hurst again appealed to the Florida Supreme Court. He candidly admitted that "[w]ithout any contention, this is a two aggravator case" and noted that he "does not challenge the trial court's findings that the murder was committed during the course of a robbery, and it was especially heinous, atrocious, or cruel. He also does not question the seriousness of these aggravators." Appellant's Initial Br. 24 (No. SC12-1947) (citation omitted). He nonetheless argued that there were sufficient mitigating circumstances to outweigh the admitted aggravators, and that a death sentence was disproportionate to the crime, which he described as a simple "robbery gone bad." *Id.* at 18.

The Florida Supreme Court affirmed, JA314, and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

1. Florida's capital sentencing framework is fully consistent with *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* set forth a narrow and specific rule: other than the existence of a prior conviction, capital defendants are entitled to a jury determination of "any fact on which the legislature conditions an increase in their maximum punishment," including the existence of an aggravating circumstance. *Id.* at 589, 609. Florida's system, which divides sentencing responsibility between judge and jury, leaves the ultimate decision with the judge, but still provides for a jury determination of whether there is at least one aggravating circumstance—meaning the jury decides whether there are sufficient facts making the defendant *eligible* for the death penalty. *Ring* requires nothing more.

Ring says nothing about who may decide whether a defendant eligible for the death penalty will actually receive the death penalty.

Once jury findings (or admissions) demonstrate at least one aggravating circumstance, the defendant is eligible for the death penalty. At that point, any additional court findings do not enhance the maximum penalty the defendant may receive, so they do not implicate *Ring*. The Court has long affirmed judges' broad sentencing discretion to impose sentences within the authorized range, even when judicial factfinding informs that discretion. By requiring the jury *and* the judge to find at least one aggravating circumstance (as opposed to the jury alone), Florida's hybrid system only provides additional protections. Additional protections do not violate *Ring*.

Nor does leaving the ultimate sentencing decision with the judge violate *Ring*. The Court has consistently recognized that the Constitution does not require jury sentencing. Even if jury sentencing were properly before the Court (this argument was neither presented in Hurst's certiorari petition nor preserved below), this Court should not overturn settled precedent upholding the hybrid judge-jury systems of Florida and other states.

2. Hurst conceded the presence of aggravating factors, and a jury found beyond a reasonable doubt that Hurst was eligible for the death penalty. Therefore, whatever one thinks of Hurst's challenges to Florida's system in the abstract (or in other scenarios), the sentence in Hurst's case is constitutional.

Hurst's concessions remove his case from *Ring*'s scope, and Hurst's remaining challenges fail irrespective of *Ring*. The jury instructions (to which Hurst did not object) did not mislead; they accurately described the jury's role. And Hurst's jury unanimity argument fails because the Court has already recognized that jury unanimity does not "materially contribute" to the essential role of the jury, which is to interpose the commonsense judgment of a body of laymen between the accused and the accuser. In the specific context of Florida's capital sentencing, where the jury is a "cosentencer" with the judge, the jury fulfills that essential role.

Hurst received all that *Ring* requires. Florida's death sentencing scheme does not violate the Constitution in light of *Ring*.

ARGUMENT

Ring v. Arizona held that "Capital defendants, no less than noncapital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. 584, 588 (2002). But *Ring* does not preclude an enhanced sentence based on facts "reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (citing *Ring*) (emphasis omitted). Here, Hurst admitted facts that authorized his death sentence. Under Florida law, a single aggravating circumstance is sufficient to justify a death sentence, *see State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005), and Hurst told the Florida Supreme Court "this is a two aggravator

case." Appellant's Initial Br. 24 (No. SC12-1947); *accord id.* (Hurst does "not challenge the trial court's findings that the murder was committed during the course of a robbery, and that it was especially heinous, atrocious, or cruel."). Hurst's concessions place this case beyond *Ring*'s scope.

Even without his concessions, Hurst's sentence satisfies *Ring*. Hurst received a death sentence only after a jury found beyond a reasonable doubt at least one aggravating circumstance. He thus received all *Ring* could require. 536 U.S. at 589.

Hurst's remaining arguments—that the Constitution commands jury-only sentencing, that his jury was improperly instructed, and that his jury's finding had to be unanimous—are not properly before the Court but fail on the merits.

Neither Hurst's sentence nor the Florida system that produced it violates the Constitution in light of *Ring*.

I. FLORIDA'S CAPITAL SENTENCING FRAMEWORK COMPLIES WITH *RING* AND *APPRENDI*'S NARROW RULE.

Florida's capital sentencing system has long divided responsibility between the judge and the jury. And for years, the Court has affirmed the constitutionality of Florida's divided system. *See, e.g.*, *Hildwin v. Florida*, 490 U.S. 638, 640 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447, 465 (1984); *Dobbert v. Florida*, 432 U.S. 282, 294-97 (1977); *Proffitt v. Florida*, 428 U.S. 242, 248-49 (1976) (joint opinion of

Stewart, Powell, Stevens, JJ.); *see also Harris v. Alabama*, 513 U.S. 504, 508-09, 515 (1995) (upholding Alabama system that was "much like that of Florida").

In the face of the Court's repeated holdings finding Florida's sentencing framework consistent with the Sixth and Eighth Amendments, Hurst argues that *Ring* fundamentally changed how the Court should view Florida's system. But Hurst conflates *Ring*'s narrow holding about death penalty *eligibility* with the issue of death penalty *selection*. So long as the jury finds—or the defendant admits—one aggravating circumstance, *Ring* is satisfied. After that, a trial court's independent findings justifying its selection do not implicate *Ring*.

A. Ring *Requires Only that Facts Necessary to Increase the Maximum Sentence Be Found by a Jury or Admitted by the Defendant.*

The rule of *Ring* and *Apprendi*, as the Court has stressed, is straightforward: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *accord Ring*, 536 U.S. at 602. In *Ring*, the Court applied *Apprendi*'s rule to the capital sentencing context, where the "fact that increases the penalty" is the existence of an aggravating factor. Based on the Court's Eighth Amendment decisions, States must limit the class of murderers who are eligible for death, and this "narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt

or penalty phase." *Brown v. Sanders*, 546 U.S. 212, 216 (2006). The existence of an aggravating factor, therefore, is the necessary and sufficient fact that renders a defendant eligible for the death penalty.[6]

Florida law enumerates specific statutory aggravators, and a defendant is eligible for the death penalty if one or more of those aggravators is found. *Steele*, 921 So. 2d at 546. Thus, the Florida Legislature has determined that a murder featuring an aggravating circumstance (for example, a murder in the course of a robbery, *see* Fla. Stat. § 921.141(5)(d)), is "a greater offense" than a murder with no aggravating circumstance, *see generally Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) (opinion of Scalia, J.), and only those guilty of that greater offense are eligible for death.

The finding of an aggravating circumstance is, therefore, a finding of eligibility for the death penalty under Florida law. This is distinct from the "determinat[ion] of which defendants *eligible* for the death penalty will actually receive that penalty." *Brown*, 546 U.S. at 216 & n.2. This second inquiry turns on the sentencer's weighing of the aggravating and mitigating circumstances. *Id.* at 216-17;[7] *see also*

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[6] Since *Apprendi* and *Ring*, this Court has applied the rule more broadly to cover findings that did not change the statutory maximum. But the Court has kept the focus on findings that increase the statutory sentencing range. *See, e.g., Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2160 (2013) (applying *Apprendi* to findings necessary for mandatory minimum); *see also id.* at 2165 (Sotomayor, J., concurring) (collecting cases).

[7] Dissenting in *Brown*, Justice Breyer similarly described death penalty proceedings as encompassing two discrete inquir-

California v. Ramos, 463 U.S. 992, 1008 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."); *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (distinguishing between statutory aggravators, which "circumscribe the class of persons eligible for the death penalty" and other factors that guide the "process of selecting, from among that class, those defendants who will actually be sentenced to death"). While *Ring* addressed the requirements for determining *eligibility* for death, it did not affect how sentencers *select* which of those eligible will be sentenced to death.

Under *Ring* and *Apprendi*, therefore, the sole question is whether Florida's sentencing framework requires a jury finding (or admission) on the existence of an aggravating factor—the only finding necessary to make a defendant *eligible* for the death penalty under Florida law.

In practice, Florida's system does just that. Absent a judicial override, which is not at issue in this case and has not been used since *Ring*, *see infra* n.9, no defendant is sentenced to death without a jury

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ies. First, "the jury must determine whether there is something especially wrongful, *i.e.*, 'aggravating,' about the defendant's conduct." If it does, "the defendant is consequently eligible for the death penalty," and "the jury (or sometimes the judge) must determine whether to sentence the defendant to death . . . ." *Brown*, 546 U.S. at 228-29 (Breyer, J., dissenting).

finding beyond a reasonable doubt at least one aggravating factor (either at the guilt or penalty phase).

B. *The Eligibility Finding* Ring *Requires Need Not Be Determined at the Penalty Phase.*

Although Hurst's arguments focus on Florida's penalty-phase proceedings, jury findings frequently establish death penalty eligibility in the guilt phase. *Cf. Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) (to make defendant death eligible, "trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). This means *Ring*'s requirement is often satisfied before the penalty phase even begins. Unlike the Arizona system challenged in *Ring*, Florida's system allows eligibility determinations at the guilt *or* penalty phase. *See* JA315, 316, 318 (Pariente, J., dissenting); *see also Ring*, 536 U.S. at 612-13 (Scalia, J., concurring).

So, for example, when a jury convicts someone for felony murder committed during the course of an enumerated crime (such as robbery, *see* Fla. Stat. § 782.04(1)(a)2.), that jury's determination necessarily establishes the defendant's eligibility for a death sentence. In that situation, an element of the crime (robbery) also constitutes an aggravating circumstance (robbery, *see* Fla. Stat. § 921.141(5)(d)), so the jury's verdict establishes both guilt for first-degree felony murder and an aggravating circumstance. *Cf. Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988) (holding that death sentence could be based on aggravating circumstance identical to element of capital crime); *Tuilaepa*, 512 U.S. at 972 ("The aggravating circum-

stance may be contained in the definition of the crime or in a separate sentencing factor (or in both)."). A defendant in that scenario still has a penalty-phase proceeding for the weighing of aggravating and mitigating circumstances, but no additional findings are necessary to establish eligibility.

Separately, *Ring* does not require jury findings establishing earlier convictions. *See Blakely*, 542 U.S. at 301, 304. Florida, like a number of other states, includes prior violent felony convictions among the statutory aggravating circumstances. *See* Fla. Stat. § 921.141(5)(b); *see also, e.g.*, Colo. Rev. Stat. § 18-1.3-1201(5)(b); Del. Code Ann. tit. 11, § 4209(e)(1)(i); Miss. Code Ann. § 99-19-101(5)(b); Tenn. Code Ann. § 39-13-204(i)(2). This eliminates approximately sixty percent of Florida's capital cases from *Ring*'s scope, as defendants in those cases also enter their sentencing phases already death eligible. *See, e.g.*, *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003); *cf. also* Pet. 29 (noting that "except for this and a few other cases, defendants usually had prior convictions for violent felonies, which can justify a death sentence, and significantly lifted imposition [of a] sentence beyond any *Ring* problems") (statutory citation omitted).

Between guilt-stage jury findings establishing aggravating circumstances (findings that satisfy *Ring*) and judicial findings about prior convictions (findings that do not implicate *Ring*), the vast majority of Florida's capital defendants (approximately ninety percent) enter the penalty phase already eligible for a death sentence. *Cf.* JA318 (Pariente, J., dissenting) (noting it is a "rare case where the death penalty is imposed without any of the aggravators that automat-

ically demonstrate that a jury has made the necessary findings to warrant the possibility of a death sentence, such as a prior violent felony conviction or that the murder occurred while in the course of an enumerated felony that was also found by a jury").

In the remaining cases, jury findings at the penalty phase establish eligibility. Either way, once death penalty eligibility is established, the sentencing judge's additional findings do not enhance the maximum punishment. Accordingly, *those* findings do not implicate *Ring*.

C. *Neither* Ring *nor Any Constitutional Provision Precludes Additional Judge Findings Once a Defendant Is Death Eligible.*

Overreading *Ring*, Hurst argues that the Sixth Amendment precludes a judge from relying on any independent findings in imposing a death sentence.[8] This not only conflates findings necessary for death *eligibility* (governed by *Ring*) with findings involved in sentencing *selection* (not governed by *Ring*), but also

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[8] Hurst does not argue specifically, however, that a jury must determine the "factual issue" of whether mitigation outweighs aggravators. Federal and state courts have consistently held that this weighing is not a factual question at all. *See, e.g.*, *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) (rejecting *Ring* argument because "the requisite weighing constitutes a process, not a fact to be found") (collecting cases); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005); *see also generally Kansas v. Marsh*, 548 U.S. 163, 174 (2006) (highlighting discretion States enjoy "including the manner in which aggravating and mitigating circumstances are to be weighed").

ignores the substantial protections Florida's hybrid system provides.

1. Court Findings After Death Eligibility Is Established Do Not Violate Ring.

To be sure, Florida's statute requires the court to make written findings about aggravating circumstances when imposing a death sentence. *See* Fla. Stat. § 921.141(3). But for a defendant already death eligible under *Ring* (whether based on jury findings, admissions, or prior convictions), the additional requirement that a judge *also* find an aggravator only provides the defendant additional protection. "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfield*, 484 U.S. at 244. A defendant already in that narrower class is unaffected by *Ring*. Under Florida's system, that defendant "will never get *more* punishment than he bargained for when he did the crime," solely based on a judge's findings. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

Because the trial court's findings at sentencing do not relate to an element of an enhanced offense, they "do not serve to increase the prescribed range of punishment," *Dillon v. United States*, 560 U.S. 817, 828 (2010). Instead, they are more akin to "the judge's exercise of discretion within that range," consistent with *Apprendi* and *Ring*. *Id.* at 828. Judges "'have long exercised discretion of this nature in imposing sentence *within [established] limits* in the individual case,' and the exercise of such discretion does not contravene the

Sixth Amendment even if it is informed by judge-found facts." *Id.* at 828-29 (quoting *Apprendi*, 530 U.S. at 481) (alterations in *Dillon*). Nothing in *Apprendi* or *Ring* changed this. Indeed, years after *Ring*, the Court held that "broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013); *accord id.* ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury."); *United States v. Booker*, 543 U.S. 220, 233 (2005) ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"); *Rita v. United States*, 551 U.S. 338, 354 (2007) ("[W]e have never held that 'the Sixth Amendment prohibits judges from ever finding any facts' relevant to sentencing.") (quoting *id.* at 373 (Scalia, J., concurring in part and concurring in the judgment)); *accord Apprendi*, 530 U.S. at 481.

There is no reason, therefore, to extend *Ring* to the findings a judge does make under Florida's system. The Sixth Amendment right in *Ring* does not attach every time a sentencing scheme involves judicial fact-finding. In *Oregon v. Ice*, for example, the Court upheld a statutory scheme providing for concurrent sentences unless a judge alone found certain facts. 555 U.S. 160 (2009). The Court rejected the notion that deciding whether to impose consecutive or concurrent sentences was "within the jury function that 'extends down centuries into the common law.'" *Id.* at 168 (quoting *Apprendi*, 530 U.S. at 477). Instead, any "entitlement" the defendant had to concurrent sentences absent judicial findings flowed

only from "statutory protections meant to temper the harshness of the historical practice" favoring consecutive sentences. *Id.* at 169.

Like the Oregon system's deviation from tradition to temper earlier harshness, Florida's conditioning a death sentence on judicial findings deviates from the tradition of mandatory death sentences or complete judicial discretion. That deviation, designed to protect defendants, *see infra* at 26-27, does not violate the Constitution.

2. Florida's Extensive Jury Involvement Exceeds Ring's *Requirement and Provides Additional Protections.*

Ring requires no jury involvement after a jury finds (or a defendant admits) an aggravating circumstance. *See supra* Part I.A. Florida's statutory system nonetheless demands substantial jury involvement to ensure capital punishment is properly limited.

Under its hybrid system, "Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances." *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) (per curiam); *see also Lambrix v. Singletary*, 520 U.S. 518, 528 (1997) (describing Florida's sentencing procedure and finding a Florida jury in essence "a cosentencer"). While a jury's recommendation carries "great weight," a judge receiving a jury's death recommendation "must still exercise its reasoned judgment in deciding

whether the death penalty should be imposed." *Ross v. State*, 386 So. 2d 1191, 1197 (Fla. 1980). On the other hand, the trial court may override a *life* recommendation only when it lacks any record support.[9] *See Cheshire v. State*, 568 So. 2d 908, 910-11 (Fla. 1990); *cf. Harris*, 513 U.S. at 508-10 (noting Court has "spo-

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[9] Florida's statute does allow judges to override a *life* recommendation, a fact Hurst emphasizes. *See, e.g.*, Pet'r Br. 20-21. That fact is irrelevant here because the jury recommended death for Hurst. *See Burch v. Louisiana*, 441 U.S. 130, 132 n.4 (1979) (petitioner convicted by unanimous jury lacks standing to challenge the constitutionality of Louisiana provision allowing conviction by nonunanimous jury). Regardless, these overrides are essentially nonexistent in Florida. The last time a Florida judge sentenced a defendant to death over the jury's recommendation was years before *Ring*. *See Woodward v. Alabama*, 134 S. Ct. 405, 408 (2013) (Sotomayor, J., dissenting from denial of certiorari) ("[N]o Florida judge has overridden a jury's verdict of a life sentence since 1999."); *accord* Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 809. Only three of Florida's current death row inmates were sentenced over the jury's life recommendation, and each entered the penalty phase already death eligible. Matthew Marshall had nine prior violent felony convictions. *Marshall v. State*, 604 So. 2d 799, 805 (Fla. 1992). Edward Zakrzewski and William Zeigler were both convicted of multiple counts of murder. *Zakrzewski v. State*, 717 So. 2d 488, 491 (Fla. 1998) (jury recommended death for two of his three murders); *Zeigler v. State*, 402 So. 2d 365, 375 (Fla. 1981) (jury recommended life for two first-degree murders and convicted for two additional second-degree murders); *see also Francis v. State*, 808 So. 2d 110, 136 (Fla. 2001) (holding that when defendant is convicted of multiple murders, the contemporaneous conviction as to one victim can support the prior violent felony aggravator as to another).

ken favorably of the deference that a judge must accord the jury verdict under Florida law").[10]

This hybrid system provides several benefits. In *Dobbert v. Florida*, which upheld Florida's death sentencing system, then-Justice Rehnquist emphasized perhaps the most obvious one: "[D]efendants have a second chance for life with the trial judge " 432 U.S. at 296. Defendants whose crimes might inflame juries may benefit from judicial detachment and experience. But there are other benefits, too. Allowing the trial court to override a jury's death recommendation helps the system "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano*, 468 U.S. at 460 (citations omitted). Separately, by conditioning a sentence on a trial judge's detailed, written findings, Florida's system provides "the opportunity for meaningful review" in the Florida Supreme Court as yet another layer of protection. *See State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973). The Court has "held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error." *Parker v. Dugger*, 498 U.S. 308, 321 (1991), *holding modified on other grounds by Brown*, 546 U.S. at 218; *see also, e.g., Barclay v. Florida*, 463 U.S. 939, 958 (1983) (plurality

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[10] The role of Florida juries in sentencing is so critical that this Court held that a jury's reliance on an invalid aggravator required resentencing, even though the judge imposing the sentence independently found the same aggravator. "[I]f a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." *Espinosa*, 505 U.S. at 1082.

opinion) (citing favorably "the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether 'the punishment is too great'") (quoting *Dixon*, 283 So. 2d at 10); *see also Dobbert*, 432 U.S. at 296.

Rather than dispute the benefits Florida's hybrid system provides, Hurst argues that the judge's independent findings—the additional requirement between the jury's finding and the death sentence—violate *Ring*. In other words, Hurst essentially argues that while a jury's conclusion alone *could* satisfy *Ring*, a jury's conclusion seconded by a judge's independent conclusion cannot. This illogical argument finds no support in *Ring*.

D. *Neither* Ring *nor Any Constitutional Provision Requires Jury Sentencing.*

In addition to arguing that a judge may not impose a death sentence that relies on her own findings, Hurst argues that a judge may not impose a death sentence at all. Instead, Hurst argues, the Eighth Amendment demands that juries—and only juries—make the death sentence determination. Because this issue was not preserved and is not within the question presented, the Court should not consider it. Regardless, the Court has long rejected claims that jury sentencing is constitutionally required, and Hurst presents no valid reason for the Court to abandon its settled law.

1. The Court should not address jury sentencing.

Hurst's petition did not argue that the Constitution requires jury sentencing. Instead, Hurst presented two issues: first, whether a jury must decide a contested intellectual disability claim, Pet. ii;[11] and second, a five-part question asking whether the Florida Supreme Court has correctly applied *Ring*, *id.* Because Hurst did not include the issue of jury sentencing in his petition, this Court should not consider it. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 207 (1997); Sup. Ct. R. 14.1(a).

It is no help to Hurst that the Court rephrased the question when granting certiorari. Like Hurst's second question, the Court's question is limited to whether Florida's sentencing system is constitutional in light of *Ring*. The claim in *Ring* was "tightly delineated" and did not include any argument "that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty." 536 U.S. at 597 n.4. Indeed, the Court quoted *Proffitt v. Florida*, which noted that it "has never [been] suggested that jury sentencing is constitutionally required." *Id.* (quoting *Proffitt*, 428 U.S. at 252 (joint opinion of Stewart, Powell, Stevens, JJ.)) (alterations in *Ring*); *accord id.* at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do

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[11] Hurst's merits brief expressly waives any argument regarding his alleged intellectual disability, Pet'r Br. 13 n.4, and the State will not address the issue.

with jury sentencing."). Furthermore, the central holding of *Ring*—that judges cannot impose death sentences based solely on their own eligibility findings—would be beside the point if judges cannot issue death sentences at all. *Cf. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007) (declining to consider issue "analytically distinct from, and fundamentally at odds with," question presented).[12]

Separately, the Court should not reach the issue because Hurst did not raise it in the Florida Supreme Court, which in turn did not address it. *See Yee*, 503 U.S. at 533; *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam). But if the Court reaches the issue, it should abide by its sound and longstanding precedent.

2. The Constitution does not require jury sentencing.

In *Spaziano v. Florida*, the Court rejected the "fundamental premise that the capital sentencing decision is one that, in all cases, should be made by a jury." 468 U.S. at 458. It acknowledged the "unique aspects" of capital sentencing but held it ultimately "involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individ-

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[12] That Justice Breyer's separate opinion on jury sentencing concurred in the *Ring* judgment but disagreed with the Court's *Apprendi* rationale, 536 U.S. at 613-14 (Breyer, J., concurring in the judgment), only further demonstrates that jury sentencing is no logical outgrowth of *Ring*'s holding.

ual." *Id.* at 459 (citations omitted). And "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Id.*; *accord Proffitt*, 428 U.S. at 252 (noting that the Court "has never suggested that jury sentencing is constitutionally required.").

In the years since *Spaziano*, the Court has only solidified this holding. In *Hildwin v. Florida*, the Court reaffirmed *Spaziano* and rejected the narrower claim that a death sentence could not stand without a specific jury finding on aggravating circumstances. 490 U.S. 638, 639-41 (1989) (per curiam).[13] Later, in *Harris v. Alabama*, the Court held "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence," rejecting the claim that the trial judge owed a particular level of deference to jury recommendations. 513 U.S. at 515. Finally, in *Jones v. United States*, which anticipated *Apprendi*, the Court noted that *Spaziano* had "addressed the argument that capital sentencing must be a jury task and rejected that position." 526 U.S. 227, 250 (1999); *see also Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)

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[13] Hurst argues that because *Hildwin* authorized death sentences "without a specific finding by the jury" on aggravating circumstances, 490 U.S. at 369, the decision did not survive *Apprendi* or *Ring*. Pet'r Br. 19. But as he later acknowledges, neither *Apprendi* nor *Ring* precluded the outcome in *Hildwin* because the aggravating circumstances included previous convictions for violent felonies, 490 U.S. at 639, which need not be found by a jury. Pet'r Br. 19 n.5 (citing *Blakely*, 542 U.S. at 301); *see also Jones v. United States*, 526 U.S. 227, 250-51 (1999) ("In *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence . . . .").

("Any argument that the Constitution requires that a jury impose the sentence of death . has been soundly rejected by prior decisions of this Court."); *Cabana v. Bullock*, 474 U.S. 376, 385 (1986), *overruled in part on other grounds*, *Pope v. Illinois*, 481 U.S. 497, 503 n.7 (1987).

Hurst contends the Court should overturn this precedent and establish a rule never before recognized. But abandoning precedent requires a substantial showing even in constitutional cases, *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996), and Hurst offers far less. According to Hurst, "history, current practice, and independent judgment" support overruling *Spaziano*. Pet'r Br. 26. None does.

a. First, Hurst's recounting of the jury's historical role in sentencing mostly works against him. Hurst acknowledges that in the country's early years, juries could determine sentences only because the law assigned fixed penalties for convictions, and juries determined guilt. *Id.* at 27; *see also Apprendi*, 530 U.S. at 479 (criminal law of the latter eighteenth century typically "prescribed a particular sentence for each offense"). Any "discretion" those early juries had to avoid death sentences, therefore, came not from law but from juries' disregarding law. *See Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (joint opinion of Stewart, Powell, Stevens, JJ.) ("At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."). That type of "discretion"—which actually survives in modern practice;

juries can still disregard instructions and convict of a lesser offense or acquit, John H. Langbein, *The Origins of Adversary Criminal Trial* 58 (2003)—cannot support a constitutional rule that only juries can impose death sentences.

Besides, after reviewing much of the same history Hurst details, the Court in *Apprendi* made "clear that nothing in this history suggests that it is impermissible for *judges* to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." 530 U.S. at 481 (emphasis added); *see also id.* ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion.") (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949)).[14]

b. As to *current* practice, Hurst notes that 27 of the 31 death penalty States have jury sentencing, which he says shows a "consensus" that jury sentencing is "the norm." Pet'r Br. 29. But his numbers do not meaningfully differ from those in *Spaziano*, in which the Court acknowledged that "30 out of 37" death penalty jurisdictions give the decision to the jury. 468 U.S. at 463. The Court also observed that "[b]esides Florida, the only States that allow a judge to override a jury's recommendation of life are Alabama and Indiana." *Id.* at 463 n.9; *cf.* Pet'r Br. 29 ("Only Florida, Alabama, Delaware, and Montana leave the final sen-

[14] While *Apprendi* was not a capital case, *Williams* was, and the Court undertook its historical analysis in that context.

tencing decision to the court."). Yet the Court rejected any argument that this "majority view" invalidated Florida's system. *Spaziano*, 468 U.S. at 464.[15]

Moreover, the consensus Hurst argues is not the type of consensus that could command change in Florida. In *Atkins*, *Roper*, and *Woodson*,[16] the Court's decisions unquestionably worked to the defendants' advantage, by either narrowing the class of individuals eligible for the death penalty (*Atkins*, *Roper*) or prohibiting mandatory death sentences (*Woodson*).[17] Judge sentencing and jury sentencing, on the other hand, are two procedural options, with neither obviously "more evolved" than the other. No capital defendant is better off with a rule that allows (rather than precludes) the execution of the intellectually disabled or juveniles, or a rule that imposes a mandatory death sentence upon conviction. Yet some defendants receive a more lenient sentence from a judge than from a jury. *See infra* at 35-36. Indeed, Florida implemented its procedure "specifically to provide the

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[15] From a numbers standpoint, this is quite unlike cases where the Court has found a constitutionally meaningful consensus. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 565-66 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989) after noting "significant" change in state practices and noting similar conclusion in *Atkins v. Virginia*, 536 U.S. 304 (2002)).

[16] *See Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 578; *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, Stevens, JJ.).

[17] Furthermore, in *Miller v. Alabama*, 132 S. Ct. 2455. 2470-71 (2012), the Court noted that the "typical" case in which the Court has "tallied legislative enactments," involves a categorical bar on a penalty based on the class of offender or the crime at issue. *Accord Graham v. Florida*, 560 U.S. 48, 60-62 (2010).

constitutional procedural protection required by *Furman*, thus providing capital defendants with more, rather than less, judicial protection." *Dobbert*, 432 U.S. at 294-95.

In this case, Hurst appears no better off either way: two judges and two juries all agreed he deserved death. But even if Hurst (or other States) prefers jury sentencing, Florida does not violate the Constitution by choosing otherwise.

c. Hurst also insists this Court's independent judgment should lead it to compel jury sentencing. He starts with the contention that retribution is the only constitutionally defensible justification for the death penalty, a point that is both wrong, *see Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) (identifying retribution and deterrence as legitimate justifications); *Glossip v. Gross*, 135 S. Ct. 2726, 2748 (2015) (Scalia, J., concurring) (noting that the death penalty also promotes incapacitation), and irrelevant. Even if retribution were the only rationale for capital punishment, "retribution is an element of all punishments society imposes, and there is no suggestion as to any of these that the sentence may not be imposed by a judge." *Spaziano*, 468 U.S. at 462. Therefore, "[i]t is entirely fitting for the moral, factual, and legal judgment of *judges and juries* to play a meaningful role in sentencing." *Barclay*, 463 U.S. at 950 (plurality opinion) (emphasis added).

Finally, any exercise of the Court's own judgment should consider the benefits of judicial sentencing. Again, imposing jury sentencing would simply change the decisionmaking process, with no obvious narrow-

ing result. "[F]or every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (noting that juries may become confused over legal standards or be influenced by emotion). Indeed, the Court earlier recognized that "it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Proffitt*, 428 U.S. at 252 (joint opinion of Stewart, Powell, Stevens, JJ.).

Many defendants benefit from the "second chance" Florida's hybrid system affords. Jason Tucker, for example, sexually assaulted and strangled a woman. *Tucker v. State*, 987 So. 2d 717, 718 (Fla. Dist. Ct. App. 2008). His victim, found dead on the floor of a sauna, had her neck cut, her face battered, her ribs broken, and suffered "injuries to her genitalia and bowel." *Id.* A jury convicted Tucker of both premeditated first-degree murder and sexual battery with great force. *Id.* Undoubtedly affected by the horror of the crimes, the jury recommended death. *Id.* at 720. But the judge overrode that recommendation, choosing life instead. *Id.* Tucker's case was not alone. *See, e.g.*, *Johnson v. State*, 100 So. 3d 1158, 1159 (Fla. Dist. Ct. App. 2012) (noting that judge overrode jury's death recommendation); *Barber v. State*, 4 So. 3d 9, 11 (Fla. Dist. Ct. App. 2009) (same). In fact, between 1974 and 2011, at least 88 defendants received life

sentences overriding jury recommendations. *See* Radelet, 2011 Mich. St. L. Rev. at 812-13.[18]

Finally, by entrusting the decision to a judge and requiring detailed written findings, Florida's system provides for more effective appellate review, allowing other defendants to receive life sentences after the Florida Supreme Court overturns a death sentence. *See supra* Part I.C.2.

Even if the merits were not clear on this issue, stare decisis would compel the same result. Stare decisis is a "foundation stone of the rule of law," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014), and "has added force" when "overturning a precedent would require 'States to reexamine [and amend] their statutes," *Harris v. Quinn*, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting) (quoting *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202-03 (1991)). Indeed, as Justice Kennedy's concurrence in *Ring* itself recognized, "the States' settled expectations deserve [this Court's] respect." 536 U.S. at 613 (Kennedy, J., concurring). There is no special justification here, and the Court should reaffirm its view that "[t]he decision whether a particular punishment—even the death penalty—is appropriate in any

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[18] Notably, in the federal system, "judges are far more likely to acquit than juries." Hon. Alex Kozinski, Preface, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xviii (2015) (citing Andrew D. Leopold, *Why Are Federal Judges so Acquittal Prone?*, 83 Wash. U. L.Q. 151, 151 (2005)). One study showed that over one 14-year period, the conviction rate was 84% for jury trials and 55% for bench trials. *See id.*

given case is not one required to be made by a jury." *Cabana*, 474 U.S. at 385.

3. The Constitution Affords States Flexibility in the Administration of their Death Penalty Systems.

None of this is to say that Florida's way is the only way. The Court has "often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority." *Espinosa*, 505 U.S. at 1082 (per curiam); *accord Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006) (noting that if state rationally narrows class of death-eligible defendants and provides for individualized sentencing determination, it "enjoys a range of discretion in imposing the death penalty"); *Harris*, 513 U.S. at 510 ("[T]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.") (quoting *Spaziano*, 468 U.S. at 464); *Spaziano*, 468 U.S. at 464 ("[W]e are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.").

This flexibility, often recognized in the context of Eighth Amendment claims, applies to the Sixth Amendment as well. In *Oregon v. Ice*, for example, the Court rejected a Sixth Amendment claim based in part on "States' interest in the development of their penal systems, and their historic dominion in this area." 555 U.S. 160, 170 (2009). The Court continued:

> Beyond question, the authority of States over the administration of their criminal

> justice systems lies at the core of their sovereign status. We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so.

Id. at 170-71 (citations omitted). Therefore, although Oregon does not follow other States' "prevailing pattern" in sentencing, "the Sixth Amendment does not exclude Oregon's choice." *Id.* at 164.

In *Ring* itself, the Court recognized the range of State choices in determining jury involvement in death sentencing. The Court identified three types of capital sentencing states: those that generally allowed jury sentencing, those (including Arizona) that "commit[ted] both capital sentencing factfinding and the ultimate sentencing decision entirely to judges," and those (Florida and three other States) that had "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination." *Ring*, 536 U.S. at 608 n.6.[19] Yet the

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[19] Hurst claims these three other states—Alabama, Delaware, and Indiana—modified their systems after *Ring*, implying that they were invalid. Pet'r Br. 25. Even if these states' decisions were relevant, the story is more complicated. Both Delaware and Alabama retained judge sentencing, which Hurst here argues is unconstitutional. The states have made clear that a jury finding is needed for the narrowing prong, bringing their systems more in line with Florida's. *See Ortiz v. State*, 869 A.2d 285, 305 (Del. 2005) ("[W]e adhere to our holding in *Brice* [cited by Hurst] that Delaware's hybrid form of sentencing, allowing the jury to find the defendant death eligible and then allowing a judge to impose the death penalty [comports with] *Apprendi* and *Ring*."); *Ex Parte Waldrop*, 859 So. 2d 1181, 1187-89 (Ala. 2002).

Court never suggested that compliance with *Ring* mandated a one-size-fits-all solution. *Cf. id.* at 612-13 (Scalia, J., concurring) (outlining how "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so "); *id.* at 613 (Kennedy, J., concurring) (noting that "*Apprendi* can be read as leaving in place many reforms designed to reduce unfairness in sentencing"). Florida's hybrid system fits comfortably within the discretion the Constitution allows.

II. HURST'S SENTENCE COMPLIED WITH THE SIXTH AND EIGHTH AMENDMENTS IN LIGHT OF *RING*.

Whatever arguments Hurst makes in the abstract about Florida's system, Hurst's own sentencing fully complied with *Ring*. Hurst conceded the existence of aggravating circumstances, and two juries found them.

Even if there were error, it was harmless. "[M]ost constitutional errors can be harmless," *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991), including in the *Apprendi* context, *see Washington v. Recuenco*, 548 U.S. 212, 215 (2006); *see also Booker*, 543 U.S. at 231 (noting that "the procedural error in *Ring* might have been harmless because the necessary finding was implicit in the jury's guilty verdict"). The failure to submit the element of an offense to the jury is subject to the harmless-error rule, *see Neder v. United States*, 527 U.S. 1, 8-9 (1999), and Courts have affirmed on

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Indiana, like Florida, recognizes that an aggravator may be found at the guilt phase, satisfying *Ring*. *See Clark v. State*, 808 N.E.2d 1183, 1196 (Ind. 2004) (collecting cases).

that basis even in death cases, *see, e.g.*, *United States v. Allen*, 406 F.3d 940, 947-48 (8th Cir. 2005) (applying *Neder* and concluding that failure to require grand jury finding on aggravator necessary for death sentence indictment was harmless error where grand jury unquestionably would have found aggravator if asked); *United States v. Robinson*, 367 F.3d 278, 286, 289 (5th Cir. 2004) (omission of aggravating factors justifying death sentence from indictment was harmless error where no rational grand jury would not find aggravator).

In this case, the evidence of robbery was overwhelming, and there is no dispute that the murder was committed during a robbery. *See supra* at 8, 9, 12. No rational jury would have concluded otherwise. *Cf. Rose v. Clark*, 478 U.S. 570, 580-81 (1986) (holding erroneous jury instruction can be harmless because "no rational jury could find that the defendant committed the relevant criminal act but did not [satisfy the inherent element]"), *overruled in part on other grounds*, *Brecht v. Abrahamson*, 507 U.S. 619, 630, 638 (1991). Indeed, had the Florida Supreme Court found insufficient evidence of premeditation, it would have affirmed the conviction as felony murder, because of the robbery. *Cf. Mungin v. State*, 689 So. 2d 1026, 1029-30 (Fla. 1995) (citing *Griffin v. United States*, 502 U.S. 46 (1991)). If the Court finds error, it should determine that "on the whole record," any error is harmless beyond a reasonable doubt. *Id.* at 583. But for the reasons that follow, there was no error.

A. *Hurst Conceded the Existence of Aggravating Circumstances.*

Ring does not require jury findings on facts defendants have admitted. *See Blakely*, 542 U.S. at 303 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."); *accord Cunningham v. California*, 549 U.S. 270, 274 (2007). Because Hurst has admitted facts sufficient to justify his sentence, his *Ring* claim cannot succeed.[20]

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[20] This Court has not specified what constitutes an "admission" for these purposes, and lower courts have disagreed to some extent. *Compare State v. Brown*, 129 P.3d 947, 952 (Ariz. 2006) (noting that "neither *Blakely* nor any of the Supreme Court's *Apprendi*-line of cases explain the context in which an 'admission' by a defendant will satisfy the defendant's Sixth Amendment right" and finding "admission" during sentencing hearing did not suffice) with *United States v. Revels*, 455 F.3d 448, 450 (4th Cir. 2006) ("Admissions may take a variety of forms, including guilty pleas and stipulations, a defendant's own statements in open court, and representations by counsel. However a defendant admits to facts, they may serve once admitted as the basis for an increased sentence without being proved to a jury beyond a reasonable doubt.") (citing *Blakely*; citations omitted). Whatever the limits, an unambiguous statement in an appellate brief should suffice. Independently, though leading to the same result, such a statement is a waiver of any Sixth Amendment right. *See United States v. Cunningham*, 405 F.3d 497, 503-04 (7th Cir. 2005).

The State did not raise Hurst's admissions in its brief in opposition. Hurst's petition principally focused on an intellectual disability claim he does not present here. He also presented five *Ring*-related claims, several of which his concession would not affect (*e.g.*, whether *Ring* requires a jury "role in determining the

Hurst acknowledged the murder was in the course of a robbery. *See supra* at 8, 9, 12. In his sentencing memorandum following the initial jury verdicts, he admitted that "[t]he State established two aggravating circumstances during the penalty phase trial"—that the crime was especially heinous, atrocious or cruel and that it was committed in the course of a robbery. 2000 ROA R.451.[21] And the trial court found in the original sentencing order that robbery was demonstrated beyond a reasonable doubt. 2000 ROA R.483. Hurst never challenged those findings in any appeal, and the Florida Supreme Court recognized that the aggravators were clearly demonstrated. JA188, 189; *see also* JA36-37. Hurst presented no evi-

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factual issue" of intellectual disability), as well as a claim the concession does affect (whether "the jury's findings of aggravating factors need [] be unanimous"). Pet. i. Under these circumstances, the Court should exercise its discretion and consider the argument. *See, e.g.*, *Jones v. United States*, 527 U.S. 373, 397 n.12 (1999) (plurality opinion) (exercising discretion to consider issue not raised in government's brief in opposition because it was "essential to an intelligent resolution" of question presented); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996).

[21] Although Florida courts recognize that a new capital sentencing proceeds on a "clean slate," *see Preston v. State*, 607 So. 2d 404, 408 (Fla. 1992), that does not mean that the Sixth Amendment precludes reliance on Hurst's admissions in the first penalty phase. The Florida Supreme Court's decision invalidating the first sentencing turned on the failure to discover and introduce mitigating evidence to weigh against the admitted aggravating circumstances. *See supra* at 10. The Court found "the fact that this murder was especially heinous, atrocious or cruel [and] that the robbery aggravator clearly exists." JA189. Regardless, Hurst's concessions persisted even after the initial resenresentencing proceeding, including in his most recent Florida Supreme Court briefing.

dence at resentencing calling into question whether the murder was committed during a robbery.[22]

Most recently, in his brief to the Florida Supreme Court in this proceeding, Hurst again conceded the existence of the statutory aggravators, focusing his appellate efforts on offsetting mitigation evidence and proportionality:

> Hurst does not challenge the trial court's findings that the murder was committed during the course of a robbery, and it was especially heinous, atrocious, or cruel. He also does not question the seriousness of these aggravators. [T]he aggravators the court found, as serious as they may be, do not, as we shall see, so far outweigh the mitigation that a death sentence is proportionally justifiable.
>
> The facts of this murder force the conclusion that this was "a robbery gone bad" homicide for which a death sentence is most likely unwarranted.

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[22] Hurst contends he "invited the jury to question whether there was reasonable doubt" as to the robbery. Pet'r Br. 9 (citing JA978-80). That does not appear so, but to the extent he suggested someone else committed the murder and robbery, a unanimous jury convicted Hurst of the murder, and Hurst has never suggested that the murderer was not the robber. Florida does not permit lingering doubt evidence about guilt during the penalty phase. *See Way v. State*, 760 So. 2d 903, 916-18 (Fla. 2000).

Appellant's Initial Br. 24-25 (No. SC12-1947) (citations omitted). He did go on to argue that a jury finding should have been required: "Specifically, although the court found Hurst had committed the murder during the course of the robbery, no jury had ever convicted him of that offense." *Id.* at 65. But Florida does not require a *conviction* to satisfy the course-of-a-robbery aggravator. *See generally Brown v. State*, 721 So. 2d 274, 282 (Fla. 1998); *cf. Brown v. State*, 473 So. 2d 1260, 1266-67 (Fla. 1985) (addressing course-of-a-rape aggravator). And no conviction—or even jury finding—is necessary in light of Hurst's concession.

B. *A Jury Found Beyond a Reasonable Doubt the Existence of an Aggravator.*

Putting aside Hurst's concessions and the harmless-error analysis, the jury (two juries, in fact) found beyond a reasonable doubt the existence of at least one aggravator. Hurst disputes whether the jury's death recommendation "impl[ied] the finding required by *Ring*." Pet'r Br. 31. In fact, the juries' conclusions more than implied the finding; they established it.

Both juries were instructed that they could not return a death recommendation without finding at least one aggravator established beyond a reasonable doubt. JA210-13; 2000 ROA Tr. 984-86. The Court must presume that juries will follow instructions, *see Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and Hurst has not suggested that they did not. Therefore, the juries' death recommendations necessarily included a finding of an aggravating circumstance. In *Jones*, 526 U.S. 227, the Court recognized just that. The Court explored *Hildwin v. Florida* (without question-

ing its vitality), and explained that "[i]n *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Id.* at 250-51;[23] *accord Steele*, 921 So. 2d at 546. Far removed from *Ring*, in which the court made its findings "sitting without a jury," 536 U.S. at 609, Hurst's case involved a jury necessarily finding at least one aggravating circumstance.

Hurst separately contends that *Ring* requires particularized jury findings about specific aggravators. Nothing in *Ring* requires the jury to provide more specificity on an aggravating circumstance (a "functional element") than on any other element of any crime. *Ring* therefore did not disturb the Court's earlier precedents that explicitly reject claims about juror specificity. *See Espinosa*, 505 U.S. at 1080 (per curiam) (upholding system while noting "[t]he verdict does not include specific findings of aggravating and mitigating circumstances, but states only the jury's

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[23] Seeking to minimize *Jones v. United States*, Hurst contends that its statement about *Hildwin* did not express "the Court's considered, authoritative judgment." Pet'r Br. 33. But he relies on the Court's statement in *Walton*—nine years before *Jones*—that "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Pet'r Br. 18, 23 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). *Jones* "foreshadowed" *Apprendi*, 530 U.S. at 476, and *Ring* later recognized the differences between the two states' systems, 536 U.S. at 608 n.6; *see also supra* at 38. If either statement is incorrect, it is the earlier statement in *Walton*.

sentencing recommendation."); *Hildwin*, 490 U.S. at 638 (rejecting claim that Sixth Amendment precludes death sentence "without a specific finding by the jury that sufficient aggravating circumstances exist").

Nor does *Ring* require—as Hurst suggests—that the jury agree on a particular aggravator. The Constitution does not require jury agreement on a particular theory of murder, *see Schad v. Arizona*, 501 U.S. 624 (1991) (plurality opinion); it likewise does not require jury agreement on a particular theory of aggravation. In *Schad*, the jury convicted the defendant of first-degree murder without specifying whether it found premeditated murder or felony murder. *Id.* at 629-30. The Court rejected petitioner's contention that the Constitution required unanimous jury agreement on a single theory. *Id.* at 629-30; *see also id.* at 650 (Scalia, J., concurring in part and concurring in the judgment) ("When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.").

What mattered in *Schad* was how Arizona viewed its own laws, and "under Arizona law neither premeditation nor the commission of a felony is formally an independent element of first-degree murder; they are treated as mere means of satisfying a mens rea element of high culpability." *Id.* at 639. Subject to due process limitations, *cf. id.* at 651 (Scalia, J., concurring in part and concurring in the judgment) (noting due process would not allow "an indictment charging

the defendant assaulted either X on Tuesday or Y on Wednesday"), the Court would not interfere with the States' authority to define elements of crimes.

Florida law does not define its statutory aggravators as elements of separate crimes—the presence of *an* aggravator is the element. *See Steele*, 921 So. 2d at 544 ("[T]he finding of 'an element of a greater offense' would be that at least one aggravator exists—not that a specific one does."); *see also Sattazahn*, 537 U.S. at 112 (opinion of Scalia, J.) (noting that in capital sentencing, "'murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter*."); *see also Richardson v. United States*, 526 U.S. 813, 817 (1999) (noting where an element of robbery is the threat of force, jurors need not agree on whether the defendant used a gun or knife to create the threat).

This approach is consistent with the narrowing requirement imposed on the States—the requirement that states limit death sentences to those more culpable than other murderers. *See Lowenfield*, 484 U.S. at 244. When the jury determines that the defendant satisfies an aggravator, even if it does not agree which one, it has determined the defendant is sufficiently culpable for the death penalty. Whether Hurst's enhanced culpability flowed from the robbery or from the heinous nature of the murder (or both), what matters is that the jury found enhanced culpability. *See Schad*, 501 U.S. at 644 (plurality opinion) (finding that moral equivalence between premeditated murder and murder in the course of a robbery "could reasonably be found"); *see also Reed v. Quarterman*, 504 F.3d 465, 482 (5th Cir. 2007) (applying *Schad* and holding

that "a court could reasonably find a moral equivalence between murder in the course of robbery and murder in the course of attempted rape."); *Jeffries v. Blodgett*, 5 F.3d 1180, 1195 (9th Cir. 1993) ("[I]t is irrelevant whether the jurors agreed upon the underlying 'crime' or 'scheme' as being murder or theft. Under the Washington statute, the specific crime is not an element The findings of a crime or scheme are merely alternative means of finding aggravated first degree murder.") (citations omitted) (citing *Schad*).

C. *The Sentence Was Not Otherwise Unconstitutional.*

Hurst's alternative arguments challenging his sentence assume that "the jury's advisory verdict satisfied *Ring*," Pet'r Br. 34, and are not properly raised here. The issues of jury instructions and jury unanimity were not presented in *Ring*, not discussed in *Ring*, and are unable to render Florida's sentencing system unconstitutional "in light of *Ring*." Moreover, Hurst's *Caldwell* argument was not preserved. Hurst did not raise it in the Florida Supreme Court or in his petition to this Court. *See supra* Part I.D.1. Nor did he offer a contemporaneous objection to the jury instruction. JA950-53, 956. *See Dugger v. Adams*, 489 U.S. 401, 408 (1989) (finding *Caldwell* argument waived under Florida law). If the Court nonetheless addresses these arguments, it should reject them on the merits.

1. The Jury Instructions Did Not Mislead.

Hurst contends that if his sentence turned on the advisory jury's verdict, then the sentence would violate the Eighth Amendment because the instructions misleadingly "minimize[d] the jury's sense of responsibility for determining the appropriateness of death." Pet'r Br. 35 (citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). To succeed with a *Caldwell* claim, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger*, 409 U.S. at 407-08. Hurst therefore must show that the challenged remarks "violated state law," *id.* at 408, yet it is undisputed that the instructions followed Florida's standard jury instructions, which the Florida Supreme Court has repeatedly upheld against *Caldwell* claims. *See, e.g.*, *Pagan v. State*, 29 So. 3d 938, 959 (Fla. 2009) (collecting cases); *Globe v. State*, 877 So. 2d 663, 673-74 (Fla. 2004).

Moreover, "*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986); *accord Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) ("The infirmity identified in *Caldwell* is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process."). In Hurst's case, the trial court told the jury that "the final decision as to which punishment shall be imposed is the responsibility of the judge," JA985, which was true. And it told the jury that its "recommendation must be given great weight

and deference," JA985, which was also true. Hurst argues that the jury would not have understood that its verdict contained an implicit finding that the State established one or more aggravating factors, *see* Pet'r Br. 35-36, but even if true, nothing in *Caldwell* requires the level of specificity Hurst urges. The instructions explained that the court would give "great weight" and deference to the jury's recommendation, and jurors surely recognized the consequence of a vote for death. Nothing in the instructions suggested the jury would not "recognize[] the gravity of its task [or] proceed[] with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 472 U.S. at 341. Instead, the instructions reminded the jury of "the gravity of these proceedings" and implored careful consideration, "realizing that human life is at stake." JA993.

2. The Sentence Did Not Violate the Sixth or Eighth Amendment Based on the Possibility of a Simple Majority Finding.

Hurst next argues that even if the jury recommendation could provide the factual finding necessary to establish death eligibility, only a unanimous vote could suffice. This argument assumes that the eligibility was not established otherwise, and Hurst does *not* specifically argue that the Constitution requires unanimous jury recommendations when aggravators are otherwise proven or admitted.[24] What he does argue is that the nonunanimous (7-5) vote on his death

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[24] Unlike his merits brief, Hurst's petition argued that allowing nonunanimous recommendations *and* nonunanimous jury findings were both unconstitutional. Pet. i, 23.

recommendation was insufficient.[25] Yet as he acknowledges, the Court has long permitted nonunanimous verdicts in state courts. Pet'r Br. 38; *see also Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality) (rejecting Sixth Amendment challenge to system allowing for conviction on 10-2 verdict); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (rejecting due process claim against 9-3 verdict); *but see Burch v. Louisiana*, 441 U.S. 130 (1979) (holding that if State employs six-person jury, unanimity is required). Moreover, while Hurst argues the history and utility of unanimous jury verdicts generally, the issue here is whether unanimity is required in the specific context of Florida's system, which includes judicial sentencing and strict appellate review as additional safeguards.

a. In *Apodaca*, the Court recognized that the Sixth Amendment does not require rigid adherence to the common law, but allows States to deviate from the traditional twelve-member, unanimous jury, so long as they preserve the jury's essential feature: the "in-

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[25] The verdict form did not separately indicate findings on aggravators. JA217. Although it is certain that all jurors recommending death necessarily found an aggravator, *see supra* at 11 (quoting jury instructions), an individual juror's vote for life does not demonstrate that juror's determination that no aggravating circumstance was proven. The juror may have found there was an aggravator but found it outweighed by the mitigating circumstances. For example, in a reported decision involving special verdict forms used, the jury unanimously found two aggravators but the jury only recommended death by a vote of 7 to 5. *See Lebron v. State*, 982 So. 2d 649, 656 & n.4 (Fla. 2008). And because many, if not most defendants sentenced to death in Florida had another indisputable aggravator, *see supra* Part I.B, the *Lebron* case is not an isolated incident.

terposition between the accused and his accuser of the commonsense judgment of a group of laymen." 406 U.S. at 410 (plurality opinion). Because unanimity "does not materially contribute to the exercise of this commonsense judgment," the Court affirmed a 10-2 jury verdict, *id.* at 410-11,[26] and in *Johnson*, issued the same day, expressed its general hesitation to "overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts," 406 U.S. at 362.

Hurst nonetheless argues that a long history of unanimity proves its need, and that Florida's "outlier" status invalidates Florida's system. But *Apodaca* reviewed that same history and allowed nonunanimous felony jury verdicts even though Louisiana and Oregon were the only States using them at the time. *See* 406 U.S. at 407-10 & nn.2-3; *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968). And these holdings followed cases where the Court rejected challenges based on jury size, despite the similar historical tradition of 12-person juries. *See Williams v. Florida*, 399 U.S. 78, 102-03 (1970).

Hurst also presents what he views as practical problems with nonunanimous juries: shorter deliberations, fewer polls, and less frequent hung juries. Pet'r Br. 44. And to be sure, the Court has addressed functional concerns about deliberations in Sixth

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[26] Justice Powell, in a single opinion concurring in *Johnson* and concurring in the judgment in *Apodaca*, limited this result to state courts. He concluded that the Sixth Amendment required unanimity, but the Fourteenth Amendment does not. 406 U.S. 366, 370-73 (opinion of Powell, J.).

Amendment cases when jury *size* was an issue. In *Ballew v. Georgia*, for example, the Court found five jurors too few to effectively deliberate, as they would be less representative and potentially unable to effectively recall the facts of the case. 435 U.S. 223, 232-39 (1978). One year later, the Court invalidated a 5-1 jury not because of "any inherent vice in nonunanimity," but primarily because of the effect of nonunanimity on the otherwise constitutional minimum jury size of six. *See McKoy v. North Carolina*, 494 U.S. 433, 468 (1990) (Scalia, J., dissenting) (analyzing *Burch*, 441 U.S. 130).[27]

Even accepting that a unanimity requirement produces *different* deliberations (although one source Hurst quotes acknowledges those difference are "small" at best, Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001)), Hurst has not shown that unanimity fosters *better* deliberations. In fact, a qualitative study he cites suggests that jurors often change their votes out of strong fears of the "failure" of a hung jury, coupled with other psychological pressures, rather than from any positive effect of the deliberative process. Scott E. Sundby, *War and Peace in the Jury Room: How Capi-*

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[27] Hurst cites language from Justice Kennedy's separate concurrence in the *McKoy* judgment, which recognizes the virtue of unanimity in the abstract. *See* Pet'r Br. 49-50. But the case involved the distinct question of whether a state could require a unanimous finding that a mitigating circumstance exists. The case did not address any need for unanimity as to aggravating circumstances, the continuing vitality of *Apodaca*, or any other question potentially at issue in Hurst's case.

tal Juries Reach Unanimity, 62 Hastings L.J. 103, 118, 131, 141-45 (2010).[28] And to the extent Hurst suggests that jurors considering the uniquely grave question of a death sentence would not give careful consideration just because unanimity is not required, his suggestion is contrary to the Court's "longstanding perceptions about jury behavior," even with much lower stakes.[29] *See Johnson*, 406 U.S. at 361-62 (criticizing notion that jury would "vote to convict even if

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[28] Hurst cites this study's claim that a first-ballot simple majority favoring death "almost invariably portends" an eventual life verdict, Pet'r Br. 44-45 (citing Sundby, 62 Hastings L.J. at 107-08), but the only first-ballot simple majority for death identified in the study resulted in a death verdict, Sundby, 62 Hastings L.J. at 108 n.9. The study includes results from a review of South Carolina juries reporting that no case (in the sample of just 7) with six to eight first-ballot death votes led to a death verdict. Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal. Stud. 277, 303 & tbl. 7 (2001) (cited in Sundby, 62 Hastings L.J. at 107-08). Even if such a small sample could yield meaningful results, South Carolina requires unanimity only for a death verdict, not for a life verdict, *see* Sundby, 62 Hastings L.J. at 108 n.11, making it an unfit comparator to traditional unanimity requirements

[29] The American Bar Association amicus brief largely relies on these same studies (at 15-16), but the brief also cites a 2006 ABA report, which in turn cites data from surveys of Florida jurors. *See id.* at 14-15 (citing ABA, *Evaluating Fairness and Accuracy In State Death Penalty Systems: The Florida Death Penalty Assessment Report* (2006)). Partly in response to the issues of juror confusion cited in the ABA's report, the Florida Supreme Court modified the standard jury instructions for capital cases. *See In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2*, 22 So. 3d 17, 19, 22 (Fla. 2009). It is these modified instructions that Hurst's resentencing jury received. *Compare id.* at 27-36, *with* JA207-16.

deliberation has not been exhausted and minority jurors have grounds for acquittal which, if pursued, might persuade members of the majority to acquit" without unanimity requirement).[30]

Regardless, stare decisis counsels against overturning *Apodaca*, which is now more than four decades old.[31] Reversing *Apodaca* would affect not just Florida, but also Oregon and Louisiana, both of whom have had their nonunanimous jury systems upheld. "Stare decisis has "added force when the legislature ha[s] acted in reliance on a previous decision." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991); *see also supra* at 36-37.

Hurst identifies no radical change of circumstances over the past four decades, and he does not argue that the rule has proved unworkable. Instead, he asks the Court to reverse *Apodaca* because Justice Powell's concurrence in the judgment (but not the plurality) relied on a theory of partial incorporation that differs from the Court's usual approach. The Court

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[30] Hurst also points to fewer hung juries from nonunanimous verdicts, Pet'r Br. 44, but hung juries are generally no better for the defense than the prosecution. *Apodaca*, 406 U.S. at 411 & n.5.

[31] Hurst claims his proposed constitutional rule would not require overturning *Apodaca*, *see* Pet'r Br. 45, but all of his arguments address unanimity. Hurst does not say that history, empirical data, or any other source supports a rule that a 10-2 majority is sufficient but a 7-5 vote is not. And if Hurst were to argue that a 10-2 rule would satisfy the Sixth Amendment, he would have to explain why this Court should disregard the fact that the initial jury found, by at least 11 votes, the existence of at least one aggravating circumstance. *See supra* note 21.

has, however, already explained that reliance on partial incorporation is not a sufficient reason to disregard stare decisis. *McDonald v. City of Chicago*, 561 U.S. 742, 784-85 & n.30 (2010) (plurality opinion) (Bill of Rights guarantee not "fully binding" on states when "stare decisis counsels otherwise"), and the Court has consistently relied on *Apodaca* in the years since, *see, e.g.*, *Schad*, 501 U.S. at 634 (plurality opinion). Under these circumstances, Hurst has failed to provide the substantial showing, *see supra* at 31, 36, necessary to overturn *Apodaca*.

At any rate, the plurality opinion in *Apodaca* justifies the result. The historical reasons for unanimity are "shrouded in obscurity," and Congress rejected an earlier version of the Sixth Amendment that would have explicitly required unanimity and the "other accustomed requisites" for criminal trials. *Apodaca*, 406 U.S. at 407-11 & n.2. These factors support a functional, rather than reflexive, approach to the question of jury unanimity, and they show unanimity is not required. *See id.* at 410-11. Notably, this is the same approach that led the Court in *Williams* to conclude that twelve-person juries were not required, notwithstanding that they were standard at common law. 399 U.S. at 87-90, 98-100; *see also United States v. Gaudin*, 515 U.S. 506, 510 n.2 (1995) (noting that *Apodaca* plurality relied on "similar analysis" to the jury size decision in *Williams*).

b. Finally, Hurst argues that even if the Sixth Amendment does not require jury unanimity on the existence of an aggravating circumstance, the Eighth Amendment does. A nonunanimous aggravating circumstance finding cannot support a death sentence,

he contends, because it would diminish the reliability of the sentencing determination. Pet'r Br. 48. But Eighth Amendment reliability does not require jury determinations on aggravating circumstances at all, much less unanimous jury determinations. *See supra* at 34-35; *cf. Schriro*, 542 U.S. at 356. In *Spaziano*, the Court held that a judge's "independent review of the evidence" to make "findings regarding aggravating and mitigating circumstances" in the context of Florida's death penalty framework provided adequate safeguards under the Eighth Amendment. 468 U.S. at 466. *Ring*, which turned exclusively on the Sixth Amendment, 536 U.S. at 607, did not change that.[32]

Florida's rule is simply unlike the procedural rules the Court found to violate the Eighth Amendment, because those have favored death. For example, in *Beck v. Alabama*, the Court held that forcing the jury to choose between letting the defendant go free and convicting the defendant of a capital crime risked an unwarranted conviction and violated the Eighth Amendment. 447 U.S. 625, 637 (1980). Likewise, States cannot prevent individualized consideration of mitigating circumstances because that, too, "creates the risk that the death penalty will be imposed in

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[32] Moreover, in both *Spaziano* and *Harris*, this Court held that, for Eighth Amendment purposes, a rule that does not have such an increased risk effect is fully constitutional even if the vast majority of states have taken a different approach. *See Harris*, 513 U.S. at 510 (noting the Court has "made clear that the 'Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.'") (quoting *Spaziano*, 468 U.S. at 464). Hurst's reference to other States' capital sentencing rules, Pet'r Br. 48-51, is therefore unhelpful.

spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). Florida's system presents no similar risks. Viewing Florida's system as a whole, any hypothetical enhanced risk from a majority verdict is more than offset by the additional protections described above. Accordingly, the Eighth Amendment no more prohibits Florida's death penalty framework than does the Sixth.[33]

* * *

Ring serves to ensure that a judge's findings alone will not determine a defendant's eligibility for the death penalty. In practice, Florida's sentencing system likewise ensures that a judge's findings alone will not determine a defendant's eligibility for the death penalty. In this case, the only finding necessary to make Hurst eligible for death was that there is at least one aggravating circumstance. The jury, the judge, and Hurst himself all agree there was. This does not violate *Ring*.

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[33] Hurst argues that the errors he argues existed, *see* Pet'r Br. at 53 (identifying nonunanimity and alleging instruction error), together constitute cumulative error rendering his sentence unconstitutional. Pet'r Br. at 52. Hurst ignores the fact that the combination of Florida's sentencing approach in most cases benefits the defendant, *see supra* at 26-27, 35-36, and in the remaining cases play a minimal role if any, *see supra* Part I.B. Regardless, Hurst's argument fails because any error *in his particular case* is harmless. *See supra* at 39-40; *cf. McCleskey v. Kemp*, 481 U.S. 279, 308-09 (1987) (holding that statistical evidence of discrimination was insufficient to invalidate death sentence absent evidence that discrimination played a role in particular case).

Florida's capital sentencing scheme was constitutional before *Ring*, and it is constitutional in light of *Ring*.

CONCLUSION

The Court should affirm the Florida Supreme Court's decision.

Respectfully submitted,

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